Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-2032

MARK STARLING,

PETITIONER,

versus

WILLIAM E. BEARD, JR.,
and through his next friend and father,
WILLIAM E. BEARD, SR.,

RESPONDENT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Donald M. Samson
MOORE & WORTHINGTON, P.C.
908 Second Avenue
Columbus, Georgia
31901
Attorney for Respondent

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STATEMENT OF ISSUE

The sole issue involved in this appeal is "Does plaintiff-respondent's complaint containing allegations of deprivation of due process of law as a result of excessive force used by a police officer in effecting an arrest state a cause of action under 42 U.S.C. 1983?"

STATEMENT OF THE CASE

Plaintiff, WILLIAM E. BEARD, JR'S., complaint states that on November 13, 1978, he was stopped for a traffic offense in the city of Columbus, Georgia by officer M. Starling, a member of the Columbus police department acting at that time as an on duty officer. The petition goes further to allege that during the course of the stop officer Starling attacked the plaintiff, wrestled him to the ground, handcuffed him to a small tree, and while plaintiff lay helpless on his back defendant raised up over him and wilfully and maliciously struck plaintiff with a blow from his fist in plaintiff's face. It is further alleged that defendant then returned to his patrol car, retrieved his night stick, returned to where plaintiff lay semi-conscious, still handcuffed to the tree, and struck plaintiff with his night stick. Plaintiff's complaint then states that these acts of defendant caused plaintiff to suffer great bodily pain and injury and mental anguish and were done

while defendant was acting under color of law and with a specific intent to deprive plaintiff of his constitutional rights to due process to be free from excessive force while being arrested as secured by the 14th amendment to the United States Constitution, federal jurisdiction being invoked under 42 U.S.C. 1983 and 28 U.S.C. 1343 (3).

ARGUMENT AND AUTHORITY

The sole question involved in this appeal is whether an allegation of excessive force used by a police officer in effecting an arrest states a cause of action under 42 U.S.C. 1983. Respondent claims that an allegation of excessive force used in effectuating an arrest constitutes a deprivation of the constitutional guarantee to due process due process including the right to be arrested in an orderly fashion free from excessive force by the arresting officer. This principle deeply embedded in our constitutional right to trial by jury was an answer to earleir times when justice was dispatched on the spot and punishment in the form of on-the-spot beating, shooting or lynching constituted a form of justice. This country progressed past this stage when the Bill of Rights was enacted and this Court has recognized the constitutional right of an individual to be free from excessive force used by law enforcement officials during an arrest. Screws vs. United States, 655, S.Ct. 1031, 1038 (1945).

In Screws (supra) this Court ruled that an element to due process is the right to a trial in a criminal case, this trial being in a Court of law and not a trial by ordeal. The facts in that case involved a young male who after being arrested on a warrant was beaten by three

law enforcement officers. The law enforcement officers were then prosecuted under 18 U.S.C. §52 which is the criminal counterpart to 42 U.S.C. 1983. The Court in holding that a constitutional right of the suspect has been violated by the law enforcement officers' use of excessive force stated:

> "Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him." Screws (supra at 1038).

Following the enunciation of this constitutional right in Screws, (supra), the federal courts have overwhelmingly held that an allegation of excessive force used in effecting an arrest states a cause of action under 42 U.S.C. 1983. Hamilton vs. Chaffin, 506 F.2d 904, 909 (CA5, 1975); Morgan vs. Lambiak, 368 F.2d 388 (CA10, 1966), "A person unlawfully beaten by an arresting officer is denied the right of due process of law; Jenkins vs. Averett, 424 F.2d 1288 (CA4, 1970), plaintiff subjected to reclkess use of excessive force by police officer, such arbitrary action constituting a constitutional violation;

Henry vs. Cagle, 482 F.2d 137 (CA6, 1973), where Constable used his official position so as to be able to commit a wholly unofficial assault, federal jurisdiction under 42 U.S.C. 1983 was proper; Gregory vs. Thompson, 500 F.2d 59 (CA9, 1974), "It is well established that §1983 provides a remedy for one who has been the victim of an assault and battery at the hands of a person acting under color of State law. ...The right violated by an assault has been described as the right to be secure in one's person, and is grounded in the due process clause of the Fourteenth Amendment; "Davis vs. Murphy, 559 F.2d 298 (CA7, 1977), "[t]he use of excessive force by police officers in effecting an arrest is well recognized ground for liability under 42 U.S.C. §1983" quoting with approval Clark vs. Ziedonis, 513 F.2d 79, 80 n. 1(CA7, 1975), and further holding that Paul vs. Davis, 96 S.Ct. 1155 (1976) does not bar this 1983 action; Bellows vs. Dainack, 555 F.2d 1105 (CA2, 1977), Rejects arguments of defendants that allegations of excessive force by law enforcement officers acting under color of State Law fail to claim for relief under 42 U.S.C. §1983 and that Paul vs. Davis, (supra) would not require control and require a contrary conclusion; Landrum vs. Moats, 576 F.2d 1320, 1327 (CA8, 1978); Use of excessive force by police officers acting under color of law establishes an action under §1983; Smith vs. Spina, 477 F.2d

1140, 1144 (CA3, 1973), though in dicta the Court states that plaintiff did not state a claim under 42 U.S.C. 1983 when he alleged an assault and battery by an officer acting under color of law, this dicta is based on deficiencies in the pleadings as stated in footnote 1 at page 1144 where the Court sanctions such actions when properly plead.

The Fifth Circuit from where this case originated has stated in Hamilton, (supra at 909),

> "Plaintiff asserted a claim cognizable under 42 U.S.C. §1983 by alleging that the defendant, while acting under color of state law, used excessive force in apprehending and detaining young Yates. The use of excessive force constituted a violation of the 14th amendment to due process, and, as such, is actionable under section 1983."

The facts of the case involved a 15 year old youth whom officers observed light and throw what was later determined to be a cherry bomb. The officers approached the youth and called for him to halt whereupon he dashed behind the hedge of a nearby residence. As the officers attempted to apprehend the youth he darted out from a bush colliding with one of the

officers causing both to tumble to the ground. When he was lifted up he was bleeding from the nose and mouth. He was immediately taken to the local jail and was booked, minutes later he was found dead in his cell having used his belt to hang himself. The petition alleged that the defendants applied excessive force during their apprehension and search of the youth. This Court's ruling, quoted above, stated that the issue of excessive force was clearly brought before the Court and stated a cause of action under 42 U.S.C. 1983.

In the same opinion that Court stated the creteria that must be considered to give rise to a constitutional deprivation of due process actionable under 42 U.S.C. 1983. Quoting with approval from the opinion of Judge Friendly in Johnson vs. Glick, (CA2) 481 F.2d 1028, cert. denied, 94 S.Ct. 462, (1974) that Court said:

> "In determining whether the constitutional line has been crossed a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that used, the extent of the injury inflicted and whether force was applied in a good faith method to maintain or restore discipline or

> maliciously and sadistically for the very purpose of causing harm."

A reading of plaintiff's complaint (R-4,5) shows that the allegations in the complaint clearly meet the criteria stated in Johnson, (supra). The allegations in plaintiff's complaint show that there was no need for the application of force by defendant, that whatever force was used by defendant was excessive, that plaintiff suffered injuries including damage to his teeth and mouth as a result of defendant's use of excessive force and that the force was not applied in a good faith effort to maintain or restore discipline but was applied maliciously and sadistically for the very purpose of causing harm. This last point clearly indicated in paragraph 7 of plaintiff's complaint where it is alleged that:

> "...while plaintiff lay on his back making no attempt to move, defendant rose over plaintiff and wilfully and maliciously struck plaintiff with an overhand blow to the face which caused blood to flow freely from plaintiff's mouth. Thereupon defendant returned to his patrol car, picked up his night stick, returned to where plaintiff lay semi-conscious, still hand cuffed to the

tree, and wilfully and maliciously struck plaintiff with his night stick." (R-5)

The question remaining to resolve the issue presented is whether there is authority which requires this Court to change the existing law. Paul vs. Davis, 96 S.Ct. 1155, (1976), which is relied upon by Petitioner stands for the proposition that a state tort action does not necessarily become a constitutional deprivation merely because it is committed by a state official acting under color of law. In Paul, (supra) plaintiff's name and photograph appeared on a flyer which was captioned "Active Shoplifters" and was distributed among local merchants by the chiefs of police of Louisville, Kentucky and Jefferson County, Kentucky. This Court in an opinion delivered by Justice Rehnquist ruled that a defamation by a state official acting under color of law did not deprive the plaintiff of any rights secured by the constitution of the United States and though the defamation may give rise to a tort action under state law there could be no cause of action invoking federal jurisdiction under 42 U.S.C. 1983 since there was no deprivation of a federal constitutional right.

This same line of reasoning was followed in the recent case Baker vs. McCollan, 99 S.Ct. 2698, (1979) in which this Court ruled that to constitute a

violation of ones civil rights, the plaintiff must be able to point to the specific constitutional guarantee which he has been deprived of by persons acting under color of state law. Baker, (supra) involved a plaintiff who was arrested pursuant to a valid warrant bearing his name and detained in jail for 3 days despite his protests of mistaken identity. Upon ascertaining that it was plaintiff's brother, who had previously been arrested and used plaintiff's driver's license for identification, and not plaintiff who should have been arrested, plaintiff was released. The court ruled that since the arrest was made pursuant to a valid warrant there had been no violation of his constitutional rights, his only cause of action possibly being a state tort claim for false imprisonment. It is clear that both Paul, (supra) and Baker, (supra) hold that a tort claim does not give rise to a action under 42 U.S.C. 1983 merely because the act giving rise to the claim is committed by an official acting under color of state law. To constitute a claim under 42 U.S.C. 1983 there must be an allegation that a constitutional right of the plaintiff was violated by persons acting under color of law. Paul, (supra at 1160), Baker, (supra at 2692). This does not mean that a cause of action based upon a constitutional deprivation such as the case under consideration should fail merely because the acts

which gave rise to the constitutional deprivation might also give rise to state tort calim. The fallacy of this reasoning can be demonstrated by reference to the situation of an illegal arrest and detention. An illegal arrest and detention is a constitutional deprivation cognizable under 42 U.S.C. 1983, Monroe vs. Pape, 81 S.Ct. 473 (1961), while at the same time constituting a cause of action for false arrest and false imprisonment under state tort law.

CONCLUSION

The right to be free from excessive force by officers in effecting an arrest is a constitutional guarantee and it has been so held by this Court. Accordingly the federal courts are nearly unanimous in holding that allegations of excessive force used by law officers in effecting an arrest state a cause of action under 42 U.S.C. 1983. This is well established law and there is no need for this Court to issue the requested writ.

Respectfully submitted this 24th day of October, 1980.

MOORE & WORTHINGTON, P.C.

Donald M. Samson
908 Second Avenue
Columbus, Georgia 31901
Attorney for Respondent

(404) 324-5606

CERTIFICATE OF SERVICE

I, the undersigned of counsel for the Respondent, do hereby certify that I have this date served the Petitioner with copies of the foregoing and attached Brief by mailing same to Hon. Eugene Hardwick Polleys, Jr., attorney of record for the Petitioner at P.O. Box 1340, Columbus, Georgia 31993.

This 24th day of October, 1980.

Attorney for
Respondent